

MONTGOMERY COUNTY, STATE OF MARYLAND

Robert M. Masters & Carolyn Masters,	:
	:
Complainant	: COMMISSION ON COMMON
	: OWNERSHIP COMMUNITIES
	:
vs.	: Case No. 30-06
	:
Norbeck Grove Community Association, Inc.,	: Panel Hearing Date: January 11, 2007
	:
Respondent	: Decision Issued: March 8, 2007
	:
	:
Panel Chair Memorandum By: John F. McCabe, Jr.	:

MEMORANDUM DECISION AND ORDER

The above captioned case came before a Hearing Panel of the Commission on Common Ownership Communities for Montgomery County, Maryland, for hearing pursuant to Chapter 10B of the Montgomery County Code, 1994, as amended. The duly appointed Hearing Panel considered the testimony and evidence of record, and finds, determines and orders as follows:

BACKGROUND

This is a complaint filed by lot owners in a homeowners association against the association. Pursuant to the governing documents of the association, the lot owners filed an application for permission to make certain changes and modifications to the exterior of their property. The lot owners contend that an outdoor stone fireplace was included in the submission to the association that was approved on November 11, 2005. The association contends that the outdoor stone fireplace was not included. The lot owners have since constructed the outdoor stone fireplace. The association has instituted its fining procedure against the lot owners. The lot owners ask that the Commission require the association to rescind its ruling that the outdoor

stone fireplace was installed without prior approval and to rescind all fines related to this dispute. Both the Complainants and the Respondent ask for reimbursement of attorney's fees.

FINDINGS OF FACT

1. Complainants are owners of property in Norbeck Grove and as such are members of the Norbeck Grove Community Association, Inc. pursuant to covenants recorded among the Land Records of Montgomery County, Maryland at Liber 14139, folio 073.

2. Respondent Norbeck Grove Community Association, Inc. is a homeowners association within the meaning of the Maryland Homeowners Association Act and is a community association within the meaning of Chapter 10B, Montgomery County Code.

3. In September, 2005, Complainants filed an application for approval of certain changes and modifications to the exterior of their property. On October 11, 2005, Complainants filed a supplement to the application. Submitted with the application was a set of drawings of the changes and modifications Complainants proposed. Complainants' Exhibit 1. At issue in this case is the significance of a handwritten notation on Complainants' Exhibit 1 that says "stone fireplace" and has a line to a specific location in Complainants' rear yard.

4. Complainants submitted no other plans or specifications showing the nature, kind, shape, height, materials and location of the "stone fireplace" as required by Article 8 of the covenants.

5. Complainants contend that the notation "stone fireplace" on Complainants' Exhibit

1 was on that document when Complainants first submitted it to the Covenant Committee of the association for approval pursuant to Article 8 of the Declaration of Covenants, Conditions and Restrictions. The witnesses who testified on behalf of the Respondent association could not

directly dispute this contention. Those witnesses did say that they did not recall seeing the language “stone fireplace” on the submitted plans.

6. When the Respondent association approved the Complainants’ application on November 11, 2005, it did not mention the stone fireplace in its approval letter. On March 14, 2006, the Respondent denied Complainants’ appeal, upheld the fines imposed, and ordered the stone fireplace to be removed within 30 days.

7. Complainants commenced construction of the stone fireplace on or about November 18, 2005. The respondent association became aware that a stone fireplace was being constructed during the first half of December and met with Complainants on or about December 11, 2005. At that time the stone fireplace was approximately half way to completion. The stone fireplace was completed in the middle of January 2006. The Respondent association did not issue a cease and desist order or other request to the Complainants to cease construction. The Respondent association did begin its fining procedure and advised Complainants that they could not use the fireplace since it had not been approved. Complainants have not used the fireplace.

8. Both parties submitted several photographs of the stone fireplace. It is a large structure, approximately 10 feet high and 4 feet wide at its widest point. It is visible from the rear yards of all properties adjacent to Complainants’ property and also from the street that abuts the front of Complainants’ property.

9. The Respondent association presented testimony that it has refused to approve at least one other outdoor stone fireplace in the community and that in general due to safety considerations, size and bulk of the structure, and its visibility from the street, it would not approve Complainants’ “stone fireplace” on the submitted plans.

10. The Respondent association adopted and had in effect Design Guidelines Standards in a Users Reference Manual relating to Modifications to Proprieties. The Design Guidelines provide in part “do know [sic] assume a change is allowed because it is not addressed in these guidelines.” Commission Exhibit 1, Page 144. None of the governing documents of the association prohibited or permitted outdoor stone fireplaces as of the time Complainants applied for the modifications and changes to their property.

CONCLUSIONS OF LAW

1. The Panel assumes for the purposes of this decision that the language “stone fireplace” was handwritten on the plans identified as Complainants’ Exhibit 1 at the time that Complainants first submitted those plans to the Covenants Committee of Respondent for approval of the proposed changes and modifications. This language is not easy to locate. The Panel also assumes for the purpose of this decision that the five members of the Covenants Committee simply overlooked this language.

2. Based upon the above assumptions, the Panel concludes that the Respondent association through its Covenants Committee, approved some type of structure that could be characterized as a “stone fireplace”. Such approval might estop the association from now denying the Complainants the right to have some approved structure, had the Complainants’ actions amounted to reasonable reliance. See generally, Savonis v. Burke, 241 Md. 316, 216 A.2d 521.

3. However, the Complainants did not submit plans and specifications showing the nature, kind, shape, height, materials and location of a proposed stone fireplace as required by Article 8 of the Declaration of Covenants, Conditions and Restrictions. Consequently, the Panel

concludes, even if it assumes that the Respondent association approved something, that Respondent did not approve the stone fireplace of the height, bulk, width and magnitude of the one constructed by Complainants' on their property. What Respondent association could be charged with approving is now a matter of speculation. However no reasonable person could conclude that the Respondent association approved what the Complainants built based upon the knowledge and information that the association had before it. Even assuming that the notation "stone fireplace" was present from the outset, the Complainants did not properly apply for what they built and the Respondent association cannot be charged with approving what the Complainants ultimately built.

4. The Complainants are at fault in this case for not following the requirements of Article 8. The Respondent association might be at fault if it failed to notice the "stone fireplace" language on the plans. But in any event, the Panel will not speculate as to what the Complainants might have built under the Respondent association's approval, or said differently, what that approval might encompass. Further, since any approval is more than twelve months old, pursuant to Section 8.2 of the Declaration of Covenants, it must be deemed to have expired. Consequently, there is at present no approval by the Respondent association for the stone fireplace constructed by Complainants or for any stone fireplace.

5. At the conclusion of the case, both parties requested awards of attorney's fees. This is not a case that justifies the award of attorney's fees to either party under Section 10B-13, Montgomery County Code. The dispute is not frivolous, and there is no evidence that either party unreasonably refused to accept mediation or delayed or hindered the dispute resolution process without good cause.

6. The parties have also requested attorney's fees under Section 16.5 of the Declaration of Covenants, Conditions and Restrictions which reads in part:

“If the Association, or any Owner or mortgagee of any Lot, successfully brings an action to extinguish a violation or otherwise enforce the provisions of this Declaration or the Articles of Incorporation or Bylaws of the Association, the costs of such action, including legal fees, shall become a binding, personal obligation of the Owner committing or responsible for such violation, and such costs shall also be a lien upon the Lot of such Owner, provided that the requirements of the Maryland Contract Lien Act are substantially fulfilled.”

The literal language of that section does not appear to apply to this case. This is not an action brought by the association to extinguish a violation and therefore the association is not in a position to receive costs and legal fees. This is also not an action by any owner to extinguish a violation. This is an action by lot owners complaining that they should not be found to be in violation of the covenants. Furthermore, the lot owners were not successful in their complaint. Consequently, the Panel does not award attorney's fees to either side.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law it is as of the effective date of this decision

ORDERED:

1. Complainants shall remove the existing stone fireplace completely within 60 days

from the effective date of this decision. They may apply with the Respondent association in accordance with the covenants to construct in place of the stone fireplace a section of wall or other construction, if they choose, to be approved by the Respondent association.
2. On the assumption that the Respondent association may have overlooked the

language on Complainants' Exhibit 1, "stone fireplace", the Panel orders that Complainants will not be responsible for any fines if they remove the existing stone fireplace as directed within the time given in this Decision and Order. If they fail to remove the fireplace as directed within the time given the \$250.00 fine assessed by Respondent will be reinstated, automatically without further action by Respondent or this Panel.

3. The requests of both parties for attorney's fees are denied.

Panel members Antoinette Negro and Jeffrey Kivitz concur in this decision.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court of Montgomery County, Maryland, within thirty (30) days of the date of this Memorandum Decision and Order, pursuant to the Maryland Rules of Procedures governing administrative appeals.

John F. McCabe, Jr., Panel Chair